LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

October Term 1957

No. 1014

Rose K. Harris, Evelyne R. Sherrick, and Renee Bouret, suing on behalf of themselves and all others similarly situated, and United Ball Bearing Co., Inc., and Seymour Dennison and Philip Denman, as co-partners doing business in the name and style of Dennison & Denman, suing on behalf of themselves and all others similarly situated, *Petitioners*,

v.

City of New York & Ors., *Respondents*,

Fordham University & Ors., *Intervenor-Respondents*.

PETITIONERS' REPLY BRIEF

David J. Sharmon
500 Fifth Avenue
New York, New York,
Attorney for Petitioners

Harris L. Present
375 Park Avenue
New York, New York,

De Sapio, Strasser & Feldman
500 Fifth Avenue
New York, New York,
Of Counsel

IN THE

Supreme Court of the United States

October Term 1957

No. 1014

ROSE K. HARRIS, EDYTHE R. SHERRICK, and RENEE BOURET, suing on behalf of themselves and all others similarly situated, and UNITED BALL BEARING CO., INC. and SEYMOUR DAMBROT and PHILIP DERMAN, as co-partners doing business in the name and style of DAMBROT & DERMAN, suing on behalf of themselves and all others similarly situated, *Petitioners*,

v.

CITY OF NEW YORK, & ORS., & C., *Respondents*,

FORDHAM UNIVERSITY, & ORS., *Intervenors-Respondents*.

PETITIONERS' REPLY BRIEF

PRELIMINARY STATEMENT

This brief is submitted by petitioners in reply to the briefs in opposition to the petition for certiorari. In view of the limited time available to petitioners' counsel for reply, this brief will be limited to some of the arguments set forth in the briefs in opposition submitted by the City of New York and Fordham University and to an anticipated argument to be submitted on behalf of respondent-intervenor, Lincoln Center for the Performing Arts, Inc. We shall make it clear (1) that petitioners have not conceded as the respondent, City of New York, suggests, (a) that "there is no prohibition excluding Fordham *per se* from the suggested plan or procedure assuming Fordham to be the successful bidder at the auction" (*City's Br.*, 5-6),

or (b) "that a religious institut
tionally barred from participation would not be constitu-
'full acquisition cost * * * of thing in the plan if it paid
obtains'" (*City's Br.*, 6); (at portion of the project it
"standing" to maintain this ac2) that petitioners have
that the only rights petitioners tion despite the contention
at will (*Fordham's Br.*, 17-18; possess is that of tenants
that if Fordham's participatic *City's Br.*, 12-13); and (3)
Urban Renewal Project is unco on in the Lincoln Square
development plan is unauthoriz nstitutional, the entire re
ed and void.

ARGUMENT

(1) The City's argument tha t petitioners have conceded
that there is no prohibition exc luding Fordham *per se* from
the project, assuming Fordham to be the successful bidder
at the auction,[1] is demonstrably inaccurate. A more accu-
rate statement of petitioners' position in the Court below
was made in the brief submitted to the New York Court
of Appeals by respondent-inter venor, Webb & Knapp Lin-
coln Square Corporation, as fo llows:

> "In the early stages of this actica, plaintiffs chal-
> lenged the Lincoln Square Project solely on the ground
> that, on the facts of the present case, Fordham would
> receive a subsidy by participating in the Project.
> (Hereinafter, this ground is referred to as 'plaintiffs'
> original position.') This is the position taken in the
> affidavit submitted in support of plaintiffs' motion for
> a preliminary injunction, which avers that '[t]he
> gravamen of the complaint is based on the sponsorship
> by Fordham University of a portion of the redevelop-
> ment plan for Lincoln Square, support and subsidy to a
> such sponsorship gives aid titution * * *. The above-
> religious educational insti that the Lincoln Square Ur-
> stated facts make it clear llegal . . .' [R. 25-26, 32-36].
> ban Renewal Project is ill on taken in the affidavit sub-
> Similarly, it is the positio ntiffs' cross-motion for sum-
> mitted in support of plain vers that '[t]hus the issue is
> mary judgment, which avc facts before the Court, and
> limited to the particular f ts is *sui generis*, no rule of
> because this state of facts

[1] *City's Br.*, 5-6.

general exclusion results and speculative consequences are irrelevant' [R. 154-155]. In the later stages of this action, plaintiffs, without abandoning their original position (Appellate Division brief, pp. 23-27; brief in this Court, pp. 25-34), challenged the Lincoln Square Project on the additional ground that no sectarian institution may be a Title I redeveloper since every Title I participant receives a subsidy by its participation. (Hereinafter, this ground is referred to as 'plaintiffs' expanded position.') Apparently, plaintiffs reached their expanded position after the decision of Special Term. Plaintiffs' affidavit in support of their cross-motion at Special Term averred that '[t]here are many ways in which a sectarian institution can properly and legally be included within a neighborhood or community being redeveloped pursuant to Title I of the National Housing Act' [R. 154]. And plaintiffs' attorney, in his final communication to Special Term before its decision, stated: 'We have heretofore conceded that there could conceivably be a state of facts under which Fordham could legally participate in a Title I project, for there is no legal prohibition *per se* which prevents government from dealing with religious institutions' (letter, dated December 19, 1957, not printed in Record on Appeal). However, in their Appellate Division brief, pp. 11-12, plaintiffs stated that, while '[i]n appellants' view, the real issue in this case is based on the undisputed facts concerning the participation of Fordham University in the Lincoln Square Urban Renewal Project * * * [g]iving the broadest possible scope to appellants' position, the issue may be whether under any state of facts a sectarian institution is barred from participation as a Title I *redeveloper*. If the Court deems resolution of that issue necessary and essential to the disposition of the instant appeal, then appellants' position is that constitutional prohibitions interdict such participation.' This position seems the burden of Point IV of their brief in this Court as well." [Brief for Respondent Webb & Knapp (N.Y. Ct. of Appeals), pp. 4-6.][2]

Moreover, the suggestion that we have conceded before this Court "that a religious institution would not be con-

[2] The numerals in brackets are "folio" numeral references transposed to reflect the pages of the record on which they appear.

stitutionally barred from participating in the plan if it paid 'full acquisition cost * * * of that portion of the project it obtains,' " *City's Br.*, 6, assumes too much. We have previously said that the purpose of "Title I" was to *subsidize* and encourage private enterprise to clear and redevelop slum areas, and that while the expenditure of Federal and municipal funds and the use of municipality's power of eminent domain to accomplish slum clearance and redevelopment is unquestionably in the public interest, implicit in these expenditures, as well as in the power of eminent domain, is the subsidy and benefit which private redevelopers receive as a result of Federal and state action. *Pet.*, 13-14. Hence, we have posed a question which in our view requires an accommodation of the legitimate powers of the Congress and of the legislative bodies of the various states and cities in attacking the problem of slum clearance on the one hand, with the constitutional principles establishing "a wall of separation between church and state" on the other. *Pet.*, 17. This accommodation of competing, but not necessarily conflicting interests will be made by this Court, not by petitioners' counsel. Thus, while we suggest that that accommodation be made in this case by holding that a religious institution may not participate in an urban renewal redevelopment project unless it pays the full acquisition cost of that portion of the project it obtains, *Pet.*, 17, nevertheless, in the delicate balancing process between the First Amendment prohibition and the legitimate powers of the Federal and municipal governments this Court will undoubtedly weigh not not only the expenditure of Federal and municipal funds, but also the use of the municipality's power of eminent domain.

So much appears from the legislative history of "Title I" itself. Indeed, in the five years immediately preceding the passage of the Act, substantial evidence had been obtained that at the root of the problem of slum clearance was the high price required to be paid for blighted or deteriorated land in central city areas. And it was this

evidence which emphasized the necessity for Federal subsidy.

> "The testimony presented during the hearings on the bill, as well as that presented in previous congressional investigations during the past 4 years, makes it clear that the high prices commanded by land in the central areas of cities, even when those areas are blighted or deteriorated, are at the heart of the slum-clearance problem. It emphasizes the necessity for Federal aid if a real start is ever to be made in the solution of this problem. These high prices for slum land, particularly in relation to the prices at which builders can acquire outlying sites, have effectively barred the purchase and the redevelopment of slum sites by private enterprise on anything but the most piecemeal and sporadic basis. *This barrier of high price has been greatly augmented by the difficulties, which for private operators are usually insuperable, of assembling large enough tracts in close-in areas to permit an economical scale of redevelopment operations.*" *S. Rep. No. 84 on S. 1070*, 81st Cong., 1st Sess., 10-11 (1949).[3] (Emphasis supplied.)

(2) Petitioners have "standing" to maintain this action, for while they are not real property owners—merely residential and business tenants, they are directly and immediately affected by the action which they challenged as a violation of the First and Fourteenth Amendments, *i.e.*, the action of the Board of Estimate of the City of New York on November 26, 1957, (a) approving the Lincoln

---

[3] The subsidy feature of the law was further illuminated by Senator Douglas, a member of the Senate Banking and Currency Committee, in explaining the statute on the Senate floor. "It is probable that the major portion of the land which will thus be cleared for redevelopment will be sold to private parties. As I have pointed out, however, the resale price of this land to private industry will necessarily, in almost every case, be less than the price which the redevelopment authority originally paid for it. There will be a loss on the resale, due to the fact that the use of the land for residential purposes will be less than its present slum value. * * * *The Federal Government will shoulder this write-down loss by a total grant of $500,000,000 and hence will give a subsidy to private industry.*" *95 Cong. Rec. 4734*, April 14, 1949. (Emphasis supplied.)

Square Urban Renewal Project Plan, (b) approving the project redevelopment contracts, including the one with Fordham University, (c) authorizing the acquisition of the project area by condemnation, and (d) authorizing the sale of the project are in accordance with said plan (R. 20-22, 29, 37-41). Under the decision of the New York Court of Appeals which upheld the City's challenged action, and in order to make way for a new campus for Fordham University—a Roman Catholic institution, petitioners will be required either to vacate their respective homes and premises or to lose their respective businesses (R. 18-20).

In *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229, this Court held that a litigant had "standing" to assert a cause of action for improper interference with an advantageous relationship, despite the fact that it was "terminable at will." *Id.*, at pp. 251-252. In *Truax* v. *Raich*, 239 U.S. 33, an alien employee whose employment was terminable at will, was held to have "standing" to challenge a State law requiring his employer to discharge all but a specified proportion of alien employees. *Id.*, at pp. 38-39. And in *Rudder* v. *United States* (C.A. D.C.), 226 F. 2d 51, month-to-month tenants in a low-cost housing development were held to have sufficient "standing" to challenge the constitutionality of the Gwinn Amendment to the Housing Act of 1937, 66 Stat. 403, 42 U.S.C. § 1411c. *Id.*, at p. 53. Thus, while the act of condemnation on February 28, 1958, subsequent to the institution of suit, may have cut-off petitioners' rights of possession by vesting title to the project area in the City (petitioners remaining in the premises as "tenants at will"), even the New York Court of Appeals recognized that:

> "Although the principal acts which the plaintiffs seek to enjoin have thus been performed, that in itself would be no bar to the further prosecution of the action at least as praying for a declaratory judgment." (*Pet.*, Appendix "B", at p. 37.)

Accordingly, it is apparent that petitioners' "standing" is at least as good as that of the appellant in *McCollum* v. *Board of Education*, 333 U.S. 203, at p. 206.

Allied-City Wide Co., Inc. v. *Cole* (C.A. D.C.), 230 F. 2d 827, cited both by the City[4] and Fordham[5] lends no support to respondents' argument. In the *Allied-City Wide* case the Court of Appeals held that plaintiff had no "standing" to maintain the suit because the challenged action of the Federal Government in giving funds to the City for an urban renewal redevelopment project did not affect the plaintiff with sufficient "directness." See, *Alabama Power Co.* v. *Ickes*, 302 U.S. 464, 480-481. Here, the action of the City attacked as unconstitutional, is the foundation upon which the subsequent act of condemnation was based. So it is no answer for the City or Fordham to say that the act of condemnation cuts-off petitioners' "standing." See, *Parker* v. *Fleming*, 329 U.S. 531, where this Court said:

> "We cannot say that tenants who are about to be evicted from their apartments on account of the order are not 'subject to' it. We are persuaded that these tenants would be required to act by the issuance of the certificate. They would either have to move themselves and their possessions to another abode, which might be difficult or impossible to obtain, or undertake defense of eviction proceedings in the State courts, which proceedings, but for the certificate, would have been barred by the regulation promulgated under the Act. For the same reason, it seems apparent that they would be immediately, substantially, and adversely affected by the order." *Id.*, at p. 538.

While the *Parker* case involved an interpretation of Section 204(a) of the Emergency Price Control Act, 50 U.S.C., Appendix, § 904(a), the force of its reasoning is no less valid here. See also, *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, at pp. 140-141, 151-156, and *Pierce* v. *Society of Sisters, etc.*, 268 U.S. 510, 535-536.

---

[4] *City's Br.*, 17.

[5] *Fordham's Br.*, 18.

(3) We think it clear that if Fordham's participation in the Lincoln Square Urban Renewal Project is unconstitutional the entire redevelopment plan is unauthorized and void. However, we anticipate that respondent-intervenor Lincoln Center for the Performing Arts, Inc. will take the position that the project is severable, *i.e.*, that the acquisition and sale of the project area does not depend upon the existence of an Urban Renewal Plan since the terms of the deeds of sale required the purchasers to meet the statutory requirements of clearance and replanning without the existence of a plan. Nevertheless, the attempted distinction between the Lincoln Square Urban Renewal Plan and the requirements of clearance and replanning of the Lincoln Square Project area is specious. The statutory requirements of clearance and replanning can be met only by a specified plan. Indeed, the "prior consent of the [New York] City Planning Commission," which under Section 72-k of the New York General Municipal Law was required prior to the City's acquisition of the project area,[6] was given by its approval of the Urban Renewal Plan (R. 29). In this latter connection, the Court will note that the City Planning Commission found that acquisition of the entire area was "necessary for the clearance, replanning, reconstruction and neighborhood rehabilitation of real property in a substandard and insanitary area." The statutory finding could have been made only for the area considered as a whole since certain parts of it are not only standard, but above standard. Thus, in *Kaskel* v. *Impelliteri*, 306 N.Y. 73, the New York Court of Appeals emphasized that a finding by the New York City Planning Commission that an area is substandard and insanitary is a determination made for the area as a whole. *Id.*, at p. 78. Accordingly, if this Court should consider the project as being severable, it would, in effect, be making its own determination as to the substandard character of the remaining portion of the project area. And in *Berman* v. *Parker*, 348 U.S. 26, this Court held that it would not usurp the

[6] *Pet.*, Appendix "A", at pp. 34-35.

statutory duties delegated to the National Capital Planning Commission. *Id.*, at pp. 33-36. Therefore, if Fordham's participation in the project is unconstitutional, we think that the entire redevelopment plan is unauthorized and void.[7]

CONCLUSION

We have not replied to respondents' argument that the record presents an ordinary contractual transaction between Fordham and the City of New York based upon what the New York Court of Appeals found to be "an exchange of considerations and not a gift or subsidy" (*Pet.*, Appendix "B", at p. 39).[8] That argument has been fully dealt with in the petition for certiorari, at pp. 11-19. Nevertheless, it is obvious that the answers to the fundamental constitutional questions posed by this case will not be found in the law of contracts. Even respondents would agree that the sale of Manhattan Island to Fordham University for twenty-four dollars would be a violation of the constitutional principle "erecting a wall of separation between church and state."

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David I. Shapiro
350 Fifth Avenue
New York, New York,
Attorney for Petitioners.

---

[7] Petitioners, who either reside or do business in the area which was condemned by the City and then sold to Fordham University, nevertheless sue on behalf of "all others similarly situated," *i.e.*, in the Lincoln Square Urban Renewal Project area. (R. 18-22).

[8] *City's Br.*, 7, 9-10; *Fordham's Br.*, 10-13.